

THE UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CARMEN CRESPO,)	
on behalf of R.M.,)	
)	
Plaintiff,)	
)	
v.)	CIVIL ACTION NO.
)	08-10846-DPW
MICHAEL J. ASTRUE, Commissioner)	
of Social Security,)	
)	
Defendant.)	

MEMORANDUM AND ORDER
May 26, 2009

The Plaintiff, Carmen Crespo on behalf of her son ("R.M."), appeals the final decision of the Commissioner of Social Security ("Defendant") denying Plaintiff's application for Child Supplemental Security Income ("SSI") payments under Title XVI of the Act. Her appeal is taken pursuant to 42 U.S.C. § 405(g) of the Social Security Act. After full consideration of the record which I find provides substantial evidence for the denial, I will affirm the defendant's decision.

I. BACKGROUND

On September 14, 2006, Plaintiff applied for SSI, claiming that R.M. became disabled on June 20, 2006. Plaintiff claims her son suffers from a severe language disorder and selective mutism which effects his ability both to acquire and use information, and to interact and relate with others.

A. R.M.'s Medical and Educational History

R.M. has a history of selective mutism. This is a language disorder which renders R.M. able to speak in some settings, such as at home or to familiar people, but not in others, such as at school or to unfamiliar people. R.M. also suffers from some level of social anxiety which makes him shy in certain social settings.

Crespo's native language is Spanish and her ability to speak or comprehend English is limited. R.M. speaks both English and Spanish at home and this has influenced his development of English language skills. R.M. was held back in the first grade, spent some of his education in a separate classroom and special education and has had other language difficulty. Starting in 2004, R.M. has received an individualized educational plan from his school; since then R.M. has apparently improved significantly and has advanced with his class each year.

In September, 2004 R.M. was evaluated by Dr. Mark Miller who observed that R.M. had been held back in the first grade for not talking in school. Dr. Miller noted that R.M. talked at home and that R.M.'s failure to speak at school appeared to be psychological.

In December 2004, Stephen Hayes, a psychologist, evaluated R.M. and observed him to be very timid, quiet, and withdrawn. He reported that R.M. did not speak at school but did at home. He diagnosed R.M. with a fear of speaking.

From December 2004 through March 2005, a social worker, whose signature is indecipherable in the record before me, noted that R.M. was very shy, covered his face with his hands and would use finger signs to communicate. Nevertheless he was very responsive to verbal directions and smiled readily. R.M. would speak softly to his teacher in her ear and softly spoke a few words to the social worker. In March 2005, the social worker noted on one occasion that R.M. was making progress and was speaking more to his friends but on another occasion R.M. was not speaking but responded with smiles when appropriate.

From January through March 2005 R.M. was subject to speech/language pathology evaluations by Miriam Rodriguez-Fusco, M.S. CCC-SLP. Ms. Rodriguez-Fusco noted that at first R.M. did not speak but "mouthed" his words to her. At later sessions R.M. would whisper single words and repeat simple sentences in a louder voice. Later still, R.M. would speak using a low voice without much prompting from the therapist. Ms. Rodriguez-Fusco noted that with encouragement and modeling louder speaking, R.M. communicated better. Ms. Rodriguez-Fusco concluded that R.M. had selective mutism. She found R.M. could speak and understand language, but did not use this ability as a result of what could be considered social anxiety in adults. She concluded, however, that R.M. did not have a communications or developmental disorder. She noted that R.M. demonstrated an age-appropriate

ability to follow and understand concepts and oral directions, to form complete sentences, and to recall sentences of increasing length and complexity in Spanish, his native language. These skills were apparent in the area of comprehension, rather than expression, due to R.M.'s selective mutism. She further noted that R.M.'s selective mutism limited his ability to express himself effectively with others at school. She determined that R.M. did not qualify for speech/language therapy sessions at that time.

In May 2005, R.M. was given a three day early childhood educational evaluation by a special education teacher, Pamela Wilson. The teacher found that R.M. played cooperatively, was friendly and engaged with other children. In class R.M. regularly spoke when encouraged but used a quiet voice and only spoke up when instructed to do so. He would keep his hands in or around his mouth. The teacher estimated that R.M., who was 7 years and 10 months old at the time, was cognitively performing at a 5.6-6.6 year old range. This was in the 69-74% range.

In October 2005, special needs teacher Janice Downey noted that R.M.'s strengths were in quantitative reasoning and his weaknesses were in his reading and writing skills. She also noted that R.M. has been diagnosed with a language based learning disability separate from his selective mutism. She determined that R.M.'s language based learning disability inhibited his

ability to acquire reading and writing skills. By December 2006, Ms. Downey noted that R.M. was making great progress in school. In March 2006, Ms. Downey noted that R.M. was performing about one year below expectations but she also reported that he was making good, steady progress on his individual education plan goals. In June 2006, Ms. Downey noted that R.M. was able to copy a sentence using capitalization and punctuation, and could identify letters and numbers 1-20.

An individual education program prepared for R.M. in June 2006 concluded that he possessed a language-based learning disability that required him to obtain special education in a classroom separate from the general education classroom.

In October 2006, R.M. and Plaintiff visited a health center to fill out a disability form. During that visit Dr. Sokarith Mey noted that R.M. had no medical problems except for a learning disability. Dr. Mey did not specify the nature of the learning disability. Later in the month R.M. returned to the health center for a physical. At that time Plaintiff stated that R.M. was in special education classes and was doing ok. Dr. Mey noted that R.M. was alert, consolable and communicated appropriately for his age.

State agency psychologist Eileen Lynch, Ph.D. submitted a non-examining evaluation on December 21, 2006. She found that R.M. exhibited a marked limitation in acquiring and using

information and was unable to write a simple sentence without help. She noted that R.M. would require resource support to move to a mainstream classroom. However, she found no limitation in R.M.'s ability to interact and relate with others. She found that R.M. was speaking with others, at a low volume, and described him as comfortable in school and enjoying classes. She found R.M. was friendly and socially interactive. Dr. Lynch did not evaluate R.M. in person.

In February and March 2007, R.M. was evaluated using SSA forms by another special educator, Marion Gunning. The conclusion of this evaluation was that R.M. suffered from serious limitations in following multistep instructions and moderate limitations in following simple instructions. R.M. also suffered from limitations in his ability to acquire and use information and very serious limitations in his ability to provide oral explanation and descriptions. Ms. Gunning found no limitation in R.M.'s ability to interact and relate with others, hold conversations with friends and family, care for himself, or move about and manipulate objects. In a separate speech and language questionnaire Ms. Gunning noted that R.M. had difficulties in being understood, particularly by those who were not familiar. Ms. Gunning estimated that R.M. would be intelligible 50% of the time to unfamiliar listeners, while being understood 80% of the time by familiar listeners. However, 90% of the time his

conversational speech was intelligible after R.M. repeated the statement.

R.M.'s file was reviewed by Dora Logue, MD, a state agency child psychiatrist, on March 9, 2007. She concluded that R.M. suffered from classic school phobia and separation anxiety symptoms. Relying only on the evaluation provided by Ms. Wilson, Dr. Logue concluded that R.M. had less than marked limitations in learning. Dr. Logue found that R.M. had marked social limitations due to the severity of his shyness, history of mutism, and his fearfulness. She noted that R.M. was slowly improving. Dr. Logue did not mention the Gunning assessment. Dr. Logue did not evaluate R.M. in person.

In June 2007 and again in June 2008 Ms. Gunning noted in R.M.'s individual education plan that R.M.'s language based learning disability inhibited his ability to acquire reading and writing skills.

In November 2007 at R.M.'s administrative hearing, Plaintiff testified that R.M. was shy and did not like to be left alone. She further testified that R.M. was starting to speak more in school and had no trouble communicating with his brothers.

B. Procedural History

Plaintiff's claim was denied at the initial level of review on December 27, 2006 and upon review by a Federal Reviewing Official on April 4, 2007.

The Plaintiff requested a hearing which was held on November 27, 2007 before an Administrative Law Judge ("ALJ"). The ALJ denied Plaintiff's claim on January 11, 2008 finding that R.M. possessed only one "marked" functional limitation and was therefore not disabled under the terms of the Act. On April 11, 2008, the Decision Review Board affirmed the ALJ's decision making that decision the final decision of the Commissioner of Social Security.

Plaintiff appeals the ALJ's decision on the basis that the ALJ erred in finding R.M. had no limitation in his ability to interact and relate with others and more specifically by allegedly ignoring Dr. Logue's finding that R.M. had such an impairment.

II. Discussion

A. Standard of Review

42 U.S.C. § 405(g) provides that "the [district] court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Commissioner of Social Security, with or without remanding the cause for a rehearing," but "[t]he findings of the Commissioner of Social Security as to any fact, if supported by substantial evidence, shall be conclusive." 42 U.S.C. § 405(g); *Manso-Pizarro v. Secretary of Health & Human Servs.*, 76 F.3d 15, 16 (1st Cir. 1996); *Evangelista v. Sec'y of Health & Human*

Servs., 826 F.2d 136, 144 (1st Cir. 1987). The court must uphold the Commissioner's finding of disability or lack thereof, "if a reasonable mind, reviewing the evidence as a whole, could accept it as adequate to support his conclusion." *Ortiz v. Secretary of Health & Human Servs.*, 955 F.2d 765, 769 (1st Cir. 1991) quoting *Rodriguez v. Sec'y of Health & Human Servs.*, 647 F.2d 218, 222 (1st Cir. 1981). "The reviewing court must affirm the Commissioner's determination, 'even if the record arguably could justify a different conclusion, so long as it is supported by substantial evidence.'" *Dasilva-Santos v. Astrue*, 596 F.Supp.2d 181, 185 (D. Mass. 2009) quoting *Rodriguez Pagan v. Secretary of Health & Human Servs.*, 819 F.2d 1, 3 (1st Cir. 1987). In particular, this Court must uphold the ALJ's resolution of conflicting medical evidence unless it is not supported by "substantial evidence." *Lizotte v. Sec'y of Health and Human Servs.*, 654 F.2d 127, 128 (1st Cir. 1981).

B. Statutory Scheme

Social Security regulations set out a three-step evaluation to determine whether a child under the age of 18 is disabled within the meaning of Title XVI of the Act. 20 C.F.R. § 416.924(a). The first determination concerns whether the child is engaged in gainful activity; if so, the child is not disabled. 20 C.F.R. § 41.924(b). The second concerns whether the child possesses a severe medically determinable impairment or

combination of impairments. 20 C.F.R. § 416.924(c). If the child's impairment is not severe, he is not disabled under the Act. The third determination reached, if the child's impairment is severe, concerns whether the impairment meets, medically equals, or functionally equals any of the listings set forth in the disability regulations at 20 C.F.R. § 404, Subpart P, Appendix 1; if so, the child is disabled. 20 C.F.R. §§416.924(d), 416.925(a).

An impairment meets a listing in Appendix 1 if the objective medical, and other findings associated with it, satisfy the specific criteria set forth in the listing, and is expected to result in death or last for at least 12 continuous months. 20 C.F.R. § 416.925(c)(3). An impairment medically equals a listing if "it is at least equal in severity and duration to the criteria of any listed impairment." 20 C.F.R. §416.926(a). A child's impairment functionally equals a listing if the impairment rises to "listing-level severity, i.e. it must result in 'marked' limitations in two domains of functioning or an 'extreme' limitation in one domain." 20 C.F.R. §416.926a(a).

A marked limitation in any domain is one resulting when an "impairment(s) interferes seriously with your ability to independently initiate, sustain, or complete activities." 20 C.F.R. §426.926a(e)(2).

The domains used in this functionally equal assessment

concern the child's age appropriate functioning in: 1) acquiring and using information; 2) attending and completing tasks; 3) interacting and relating with others; 4) moving about and manipulating objects; 5) caring for himself; and 6) health and physical well-being. 20 C.F.R. §§ 416.926a(b)(1)(I)-(vi). See also *Neal ex rel. Walker v. Barnhart*, 405 F.3d 685, 688-689 (8th Cir. 2005).

For each domain of functioning, the regulations set forth examples of some activities typical of children in each age group and some functional limitations that will be considered. 20 C.F.R. § 416.926a(f)(3). For example, the regulations pertaining to interacting and relating with others, the domain at issue in this case, include hallmarks of functioning for a child aged 6 to 12. These are developing "more lasting friendships" with children of the same age; beginning "to understand another's point of view and to tolerate differences", be able to talk to people of all ages, to share ideas, tell stories, and to speak in a manner that both familiar and unfamiliar listeners readily understand. 20 C.F.R. § 416.926a(i)(2)(iv).

C. ALJ's Decision

The ALJ found that R.M. was not engaged in substantial gainful activity, thus satisfying step 1 above, and that R.M.'s language based learning disorder and history of selective mutism were severe impairments, thus satisfying step 2 above. However,

the ALJ found that R.M.'s impairments did not meet or medically equal the listing of impairments and therefore did not satisfy step 3 above. Specifically the ALJ found that R.M. had a marked limitation in only one area of functioning: acquiring and using information.

The ALJ found that R.M. did not have a marked limitation in interacting and relating with others. The ALJ found that the medical evidence did not support the allegations that R.M. suffered significant social deficits due to his selective mutism. Further the ALJ found that R.M.'s ability to communicate began to improve since he started receiving educational assistance. The ALJ found that R.M. was comfortable in school and friendly and socially interactive.

In his discussion, the ALJ did not specifically address the conclusions from Dr. Logue's reports that R.M. had a marked limitation in interacting and relating with others. At another point in his opinion, however, the ALJ agreed with Dr. Logue's overall conclusion that R.M. was not disabled.

D. Plaintiff's Contention

The Plaintiff asserts that the ALJ's assessment of R.M.'s functional limitations with regard to his ability to interact and relate with others was not supported by substantial evidence. Plaintiff argues that Ms. Gunning's finding that R.M. can be understood by those familiar to him 80% of the time and those

unfamiliar to him 50% of the time is proof that he has a significant limitation on his ability to communicate, which in turn impacts his ability to interact and relate with others. The Plaintiff further argues that the ALJ committed an error by not specifically addressing Dr. Logue's conclusion that R.M. had a marked impairment in his ability to interact and relate with others.

E. Analysis

The fundamental issue before me is whether the ALJ had "substantial evidence" to conclude that R.M. did not have a marked limitation in his ability to interact and relate with others.

There is clear evidence that R.M. has some degree of difficulty in communicating with others resulting from his social anxiety and history of selective mutism. One expert, Dr. Logue, and separately the Federal Reviewing Official,¹ concluded that R.M. had a marked impairment in his ability to interact and relate with others.

However, the majority of the evidence in the record indicates that R.M.'s communication difficulties do not involve a

¹ The Federal Reviewing Official's decision is not formally part of the record of this case and accordingly may not be counted as evidence before the ALJ, 20 C.F.R. §§405.360, 405.370(a). I note, however, that the ALJ referenced the decision in his own decision.

marked limitation in his ability to interact and relate with others.

When an ALJ is faced with contradictory evidence on the record, he is allowed to resolve the conflict by differentially according more weight to certain evidence. *See Rodriguez*, 647 F.2d at 222.

1. Marked Limitation In Ability to Interact or Relate with Others

Numerous experts found, contrary to Dr. Logue, that R.M. does not have a limitation in his ability to interact and relate with others. These experts found that he was friendly, social and capable of developing relationships and interacting with others. Further, the opinions of sources who have examined a claimant are generally given more weight than sources who have not. 20 C.F.R. § 404.1527(d)(1). After examining R.M., special educator Ms. Gunning found that R.M. did not have a limitation in his ability to interact and relate with others. Dr. Logue, by contrast, did not examine R.M. but instead only examined his file. The Plaintiff's have offered no argument as to why Dr. Logue's findings are required to be accorded more weight than Ms. Gunning's.

Dr. Logue, while finding that R.M. had a marked limitation in his ability to interact and relate with others also found that R.M. had a less-than-marked limitation in acquiring and using information. Her overall conclusion was that R.M. did not have a

disability. Therefore, even if the ALJ had wholly accepted and entirely relied upon Dr. Logue's opinions and rejected those of Dr. Lynch and Ms. Gunning, the opinions would still be a finding that R.M. is not disabled under the statute. 20 C.F.R. § 416.926a(a). In order for the ALJ to have found that R.M. had two marked impairments and was therefore disabled he would have to have accepted Dr. Logue's first finding but rejected her second finding and accepted Dr. Lynch's and Ms. Gunning's findings regarding R.M.'s marked limitation in acquiring and using information, at the same time rejecting their finding with regard to his ability to interact and relate with others. In either case, the ALJ would have to have rejected one of Dr. Logue's findings. Since the rest of the record supports a finding that R.M. did not have a marked limitation in his ability to interact and related with others, I conclude that the ALJ had substantial evidence to support his determination and reject Dr. Logue's findings with regard to this domain.

The Plaintiffs also argue that the ALJ did not simply reject Dr. Logue's findings, but entirely ignored the fact that they contradicted the ALJ's findings. The ALJ opinion specifically agreed with Dr. Logue's overall conclusion that R.M. does not have a disability, but it does not specifically address Dr. Logue's finding that R.M. had a marked limitation in his ability to interact and relate with others. While it is true that a

hearing officer must consider all the evidence, "[t]he hearing officer was not obligated, however, to address directly every piece of evidence." See *Dasilva-Santos*, 596 F.Supp.2d at 188. "Omissions do not prove that the decision lacked substantial evidentiary support." *Id.* "A hearing officer 'can consider all the evidence without directly addressing in his written decision every piece of evidence submitted by a party.'" *Coggon*, 354 F.Supp.2d at 55 quoting *NLRB v. Beverly Enterprises Massachusetts, Inc.*, 174 F.3d 13, 26 (1st Cir. 1999). Nevertheless, when there is considerable evidence contrary to the position of the Social Security Administration, the hearing officer must provide at least a minimal analysis of this contrary evidence. *Dasilva-Santos*, 596 F.Supp.2d at 189.

While the ALJ opinion does not acknowledge Dr. Logue's specific contradictory findings regarding R.M.'s ability to interact and relate, the opinion does provide an analysis as to why he did not find R.M. to have a marked limitation in this domain. The ALJ found that based on the record, R.M. was comfortable in school, socially interactive, participated in classes and has been able to speak without significant limitation since the initiation of special education. In addition, the ALJ acknowledged that the Federal Reviewing Official. The Federal Reviewing Official found that R.M. had less than marked limitation in acquiring and using information, no limitation in

attending and completing tasks and marked limitations in interacting and relating with others. The ALJ disagreed with the Federal Reviewing Official's findings regarding specific domains but agreed with the overall conclusion that R.M. is not disabled.

In this case the ALJ had substantial evidence to support a finding that R.M. had no marked limitation in his ability to interact and relate with others and further did not ignore contrary evidence.

2. Ms. Gunning's Findings

With regard to Ms. Gunning's findings that R.M. could only be understood by those unfamiliar with him 50% of the time and those familiar with him 80% of the time, I note she also found that R.M. could be understood 90% of the time by both those familiar and unfamiliar with him when he repeated his statements. The Plaintiff places great weight on Ms. Gunning's conclusion that R.M. could only be understood by unfamiliar listeners 50% of the time. The Plaintiff largely ignores Ms. Gunning's other findings however, including that R.M. did not have a marked limitation in his ability to interact or relate with others. These other findings lend support to the ALJ's conclusions. Further, while the ability to communicate with others is one of the factors considered in determining if a child has a marked limitation in his ability to interact and relate with others, it is not the only factor. Other factors include whether the child

can build more lasting friendships with children of the same age, begin to understand another's point of view and tolerate differences. Thus Ms. Gunning's findings, while indicating that R.M. has some difficulties in communication, support the ALJ's conclusion that R.M. did not have a marked impairment in this domain.

CONCLUSION

For the reasons stated more fully above, I affirm the decision of the Social Security Administration and accordingly grant the Defendant's motion to affirm (Docket No. 20) and deny the Plaintiff's motion to remand (Docket No. 18).

/s/ Douglas P. Woodlock
DOUGLAS P. WOODLOCK
UNITED STATES DISTRICT JUDGE